BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARGARET PETERSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 154,563
TONY'S PIZZA SERVICE	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
THE KANSAS WORKERS COMPENSATION FUND	)	

ORDER

ON the 4th day of November, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of an award entered by Administrative Law Judge George R. Robertson on October 1, 1993, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by her attorney, Gary L. Jordan, of Ottawa, Kansas. The respondent and insurance carrier appeared by their attorney, John W. Mize, of Salina, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Norman R. Kelly, of Salina, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the October 1, 1993, award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Did the claimant meet with personal injury by accident on the dates alleged?

(2) Did these injuries arise out of and in the course of her employment?

(3) What is the nature and extent of claimant's disability?

(4) Is claimant entitled to future medical benefits?

(5) What is the liability of the Kansas Workers Compensation Fund, if any?

(6) What, if any, temporary total disability is claimant entitled to between the periods October 21, 1989 through and including December 20, 1989, and November 23, 1990 through and including April 15, 1991, a period of 29.28 weeks?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) The claimant, Margaret Peterson, settled a prior claim for injury to her low back in Docket No. 122,934, on April 17, 1987.

(2) After entering into this agreed award for a 13.75 percent whole body impairment, the claimant returned to work for the respondent at a comparable wage, as a crust feeder.

(3) The claimant did experience several episodes with her back and testified that her back always hurt with the claimant experiencing intermittent radiculopathy into the leg and foot. Claimant continued to perform her regular duties at Tony's Pizza through April, 1989, at which time she missed several weeks for a non work-related bladder infection.

(4) Claimant was returned to work in May, 1989, at her regular duties. In June, 1989, claimant began experiencing more severe problems and testified regarding a day in June, 1989, when her leg and back were noticeably worse due to the work load at Tony's Pizza. During the period June, 1989 through October, 1989, claimant's symptoms became much worse and were described as being "very bad." Claimant went to Dr. Alan Kruckemyer, the authorized treating physician, and advised him of the increased symptomatology and work load problems. Dr. Kruckemyer advised claimant to reduce her work load from six or seven days a week to five days a week, 40 hours per week maximum.

(5) The 5 day per week, 40 hour per week maximum restriction was provided to Sandy Stone, the safety supervisor for the employer. Shortly thereafter, on October 21, 1989, the claimant was placed on medical leave of absence without pay. Claimant received no income or temporary total benefits until December 21, 1989, at which time temporary total voluntarily was started by the respondent and insurance company.

(6) The respondent has admitted that claimant suffered an injury arising out of and in the course of her employment from June, 1989 through and including October 20, 1989. Respondent has further admitted notice and timely written claim. The Kansas Workers Compensation Fund has denied the above issues but a review of the record fails to uncover evidence to support the Fund's contentions.

(7) The Kansas Workers Compensation Fund's liability is derived from that of the respondent. What information would be available to the Workers Compensation Fund to deny the above issues which would not be available to the respondent is unclear. The Appeals Board finds the respondent was provided appropriate notice of the claimant's alleged injury of June, 1989 through October 20, 1989, and further finds the claimant filed a timely written claim, per K.S.A. 44-520a, within 200 days of the date of accident or within 200 days after the date of the last payment of compensation.

(8) The claimant was treated by Dr. Alan Kruckemyer in 1987 for problems associated with the same area of her low back. Subsequent to the treatments provided, the claimant entered into a stipulation for an agreed award with the respondent, Schwan's Sales, Inc., d/b/a Tony's Pizza Service, Docket No. 122,934, on February 28, 1989.

(9) As a result of that stipulated running award, claimant was provided future medical treatment at the expense of the respondent/insurance carrier upon proper application to the Director or by agreement of parties. Claimant was further awarded weekly benefits at the rate of $29.42 per week, for 319 weeks from and after February 25, 1989.

(10) It is the contention of the Kansas Workers Compensation Fund that claimant did not suffer a new injury arising out of and in the course of her employment for the dates June, 1989 through and including October 20, 1989. The Fund alleges and argues that the claimant's problems during this period were no more than a continuation of the original problems suffered by claimant in Docket No. 122,934 and claimant should be denied any award with the exception of future medical treatment and should be required to proceed with an Application for Review and Modification as a result of these increased complaints.

(11) Claimant's allegations of a new and separate injury are supported by her own testimony wherein she discusses the increased symptoms beginning in June, 1989. The claimant testified that the pain in 1987 was

different from the pain in 1989 in that the 1989 pain was more sharp and the leg and back pain was noticeably worse due to her work.

(12) Dr. Kruckemyer testified that although claimant alleged no specific incident in 1989, she did seem to complain of additional leg pain with pain into the thigh and down to the knee after June, 1989. Dr. Kruckemyer's 1989 letter indicated claimant was spending a considerable amount of time at her employment, standing, and the six day weeks were causing her achiness in her back and legs.

(13) Tests performed by or at the request of Dr. Kruckemyer, including a CT scan, indicated claimant, while suffering a bulging disc in 1987, had no indication of disc herniation. X-rays taken in 1987 also failed to show any specific disc herniation in the claimant's lumbar spine but instead showed moderate changes at L4-5, L5-S1. Subsequent to claimant's increased complaints in June, 1989, an additional CT scan was performed on July 7, 1989. At this time a distinct disc herniation was found.

(14) Dr. John Wertzberger examined the claimant in March, 1991, and opined the claimant's increased problems including thigh pain, tightness in the thigh, knee and calf, low back muscle spasms and pain, all indicated a new injury aggravated by claimant's work duties. Dr. Wertzberger acknowledged the tests in 1989 indicated a change in the disc and felt, while there was no sudden traumatic event noted, claimant had suffered an aggravation of a preexisting condition leading to a new injury. The CT scan taken in 1989 showed a distinct change in the physical structure of the claimant's body between 1987 and 1989, with this change being confirmed by myelogram.

(15) Dr. Robert Eyster testified that the claimant's problems were nothing more than a continuation of the original 1987 injury with a gradual increase in pain. He further testified the claimant's symptomatology was not aggravated by her work activities and the increased symptoms would have occurred regardless of claimant's work status. He also opined that the claimant's work activities did not increase her impairment or disability.

(16) Dr. Eyster agreed the 1987 tests failed to show disc herniation or leg radiation subsequent to the claimant's original 1987 injury. When questioned regarding the 1989 CT scan, Dr. Eyster, who did not actually see the CT scan but only saw the radiologist's report, disagreed with the radiological interpretation of the test. Dr. Eyster did admit the claimant specifically mentioned the bending, stooping, and twisting at work had aggravated her condition and acknowledged subsequent to June, 1989, her symptoms increased.

(17) K.S.A. 44-501(a) states in part:

> "If in any employment to which the workmen's compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workmen's compensation act. In proceedings under the workmen's compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

(18) K.S.A. 44-508(g) defines burden of proof as follows:

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true", on the basis of the whole record.

(19) K.S.A. 44-508(e) states as follows:

> "'Personal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence."

In this matter claimant has testified to an increase in symptomatology from and after June, 1989, with this increase in symptomatology being verified by Dr. Kruckemyer, Dr. Wertzberger, and even, though reluctantly, Dr. Eyster. The medical tests performed on the claimant verified the significant change in the physical structure of the claimant's body with significant damage or harm shown on the 1989 CT scan and myelogram.

(20) The Workers Compensation Appeals Board on review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge, shall have the authority to grant or refuse

compensation, or to increase or to diminish any award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section 53(b)(1).

(21) The opinions of Dr. Wertzberger and Dr. Kruckemyer show claimant suffered an increase in pain and symptomatology and a definite and specific change in the physical structure of the body all indicating that during the period June, 1989 through and including October 10, 1989, claimant suffered an injury arising out of and in the course of her employment. The allegations of Dr. Eyster that this is a continuation of the April, 1987 injury, do not appear to be supported by the medical record.

(22) This Appeals Board is persuaded by a preponderance of the credible evidence that the claimant suffered a new and distinct injury during the period June, 1989 to October 20, 1989.

(23) Claimant has alleged additional temporary total disability due from the period October 21, 1989, when she was taken off work by Tony's Pizza and placed on medical leave of absence until December 21, 1989, at which time temporary benefits were started by the respondent and insurance carrier.

Claimant was originally returned to work on October 20, 1989, with a recommendation from Dr. Kruckemyer that she be reduced to a 40 hour work week to ascertain whether her increasing symptomatology would resolve. Unfortunately, this accommodation was not offered by the respondent, Tony's Pizza, and claimant was placed on medical leave of absence.

On December 13, 1989, Dr. Kruckemyer, in his letter addressed "to whom it may concern," recommended that since the recommended accommodations with the employer could not be made in the claimant's work schedule, she would be unable to work at this time and would be considered disabled from and after his October 17, 1993 visit.

(24) The burden of proof is upon the claimant to establish her right to an award for compensation by proving all the various conditions upon which her right to it depends. This must be established by preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

(25) Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel Inc., 221 Kan. 191, 558 P.2d 146 (1976).

(26) The testimony of the claimant coupled with the medical opinion of Dr. Kruckemyer are uncontradicted evidence which has not been shown to be untrustworthy. The Appeals Board finds claimant was temporarily totally disabled from the period October 21, 1989 through and including December 20, 1989, a period of 8.71 weeks, and was entitled to additional temporary total benefits at the statutory maximum rate of $271.00 per week during this period of time.

While this issue appears to have been raised at the regular hearing by the attorney for the claimant it does not appear to have been addressed in the award of October 1, 1993. The Appeals Board finds the Award of Administrative Law Judge George R. Robertson shall be and is herein is modified to show an additional payment of temporary total benefits for 8.71 weeks during the dates above specified in the total amount of $2,360.41.

(27) With regard to the issue of claimant's functional impairment and work disability, the record is filled with conflicting impairment ratings and opinions. As stated earlier, the Workers Compensation Appeals Board does have the authority to grant or refuse compensation or to increase or diminish any award of compensation as it deems appropriate after considering the record as a whole.

(28) The claimant contends she is permanently and totally disabled as a result of the injuries suffered July, 1989 through and including October 20, 1989.

(29) Claimant was evaluated by three qualified physicians. Dr. Alan Kruckemyer, while finding claimant has significant physical problems, felt she was capable of returning to substantial gainful employment with the limitation that she lift no more than 20 pounds maximum with a ten pound frequent lift restriction. She needed to avoid prolonged bending and leaning at the waist, avoid stooping and bending and avoid prolonged standing and walking.

Dr. Robert Eyster, who examined claimant on behalf of the Fund, found she had a 13 percent whole body functional impairment as a result of degenerative disc disease and restricted her from repetitive bending and twisting more than four to five times per hour. Dr. John Wertzberger, the most restrictive of the examining physicians, rated claimant at 22 percent to the whole body on a functional basis, and restricted her to sedentary work only with a maximum lift of ten pounds with no more than 12 lifts per hour.

(30) Claimant was examined and evaluated by Mr. Bud Langston of Kansas Rehabilitation and Clinical Consultants. Mr. Langston, in evaluating claimant's loss of access to the open labor market and her loss of ability to earn a comparable wage, found claimant had been reduced in both categories but was not 100 percent restricted in either category from obtaining employment in the open labor market.

(31) Mr. Don E. Vander Vegt, the most restrictive of the evaluators, from a vocational rehabilitation standpoint examined claimant and found her to be capable of performing a small number of jobs within her limitations. Mr. Vander Vegt did not know of any jobs within her restrictions in the Salina area, but also admitted he had never worked in the Salina market and was not familiar with that market.

(32) K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, shall, in the absence of proof to the contrary, constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts."

(33) A person is considered permanently and totally disabled when the person is completely and permanently unable to engage in any type of substantial and gainful employment. Ploutz v. Ell-Kan Co., 234 Kan. 953, 676 P.2d 753 (1984). "The test of being completely and permanently unable to engage in any type of substantial and gainful employment determines when disability is total...." Grounds v. Triple J Constr. Co., 4 Kan. App. 2d 325, 606 P.2d 484 (1980).

(34) The Appeals Board has thoroughly reviewed the entire record in this matter and finds the evidence taken as a whole does not support claimant's contention she is permanently and totally disabled as a result of her injuries.

(35) This Appeals Board must next consider whether the claimant should be limited to a functional impairment or whether she is entitled to a permanent partial general disability. The doctors all agree that claimant, while being limited in her work abilities, nevertheless, does have the ability to perform some type of work in the open labor market although they do disagree as to the specific restrictions to be placed upon the claimant.

K.S.A. 44-510e(a) states in part:

> "Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by complete medical evidence.
>
> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of them employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment."

(36) As the claimant's lowest functional impairment rating is Dr. Eyster's, i.e., 13 percent impairment to the body as a whole, and the highest work disability comes from Don Vander Vegt, i.e., 96 percent loss of ability to perform work in the open labor market, claimant's award is restricted to between 13 percent and 96 percent.

(37) Mr. Bud Langston and Mr. Don Vander Vegt, both vocational rehabilitation experts, evaluated the claimant's ability to perform work in the open labor market and to earn a comparable wage. Both agreed, although differing on the percentages, that claimant had suffered a loss of both the ability to work in the open labor market and the ability to earn a comparable wage. As no contradictory evidence is supplied indicating claimant should be limited to a functional impairment only, and as all of the medical providers who evaluated the claimant agree, she is limited physically in her ability to obtain work, it is the Appeals Board's finding that claimant is entitled to a permanent partial general disability and an award based upon her reduced ability to perform work in the open labor market and to earn comparable wages as they have been reduced as a result of her work related injuries suffered in this matter.

(38) This Appeals Board must express some dissatisfaction with the evidence presented regarding this issue. Neither of the above experts was provided complete information, thus, creating a serious question regarding the credibility of their evidence and their ability to testify. Mr. Langston provided a wage loss survey while using an

average weekly wage of $320.00 per week. This wage, originated from the 1987 accident and clearly had nothing to do with the agreed upon wage of $429.28 stipulated to by the parties at the regular hearing in this matter.

Mr. Langston, in his further evaluation of this claimant's ability to obtain work in the open labor market failed to fully account for the alteration of Dr. Kruckemyer's restrictions from 1987 to 1989. Mr. Langston alleged during his testimony that claimant's restrictions from 1987 to 1990 were very similar, but on cross-examination was forced to admit that the additional restrictions of no prolonged standing and walking would have an effect upon his evaluation of her ability to obtain work in the open labor market. He further admitted that the restrictions of Dr. Wertzberger were more limiting than those of Dr. Kruckemyer and further agreed that, after the claimant went through extensive vocational retraining, she experienced considerable difficulty in obtaining employment in the Salina area. Mr. Langston, being familiar with the Salina area, was competent to testify that there were jobs in the Salina area, although semi-skilled, which the claimant did have the ability to perform.

This Appeals Board, in reviewing the opinion of Mr. Langston finds that his opinion, in failing to take into consideration the appropriate average weekly wage and in failing to consider the more restrictive 1989 restrictions of Dr. Kruckemyer and the even more restrictive restrictions of Dr. Wertzberger, is insufficient to properly compensate claimant for her loss.

(39) The Appeals Board also considered the testimony of Mr. Don Vander Vegt, the vocational expert for the claimant. Mr. Vander Vegt found claimant to be 100 percent reduced in her ability to earn comparable wages and 96 percent reduced in her ability to obtain work in the open labor market. Unfortunately, Mr. Vander Vegt uses the most limiting restrictions of Dr. Wertzberger in reaching his conclusion and fails to take into consideration the less limiting restrictions of Dr. Kruckemyer, the treating physician, and Dr. Eyster, the evaluating physician from Wichita. Mr. Vander Vegt was not familiar with the Salina market, thus, being limited in his ability to express a legitimate opinion regarding what, if any, work would be available to the claimant within her specific medical restrictions in Salina.

In evaluating the opinion of Mr. Vander Vegt the Appeals Board finds that while there is valuable information to be obtained from Mr. Vander Vegt's opinion, his opinion, nevertheless, is based upon incomplete information and his impairment ratings are higher than are supported by a review of the entire record.

(40) In determining the extent of permanent partial disability, both the reduction of a claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. "The statute is silent as to how this percentage is to be arrived at, and, absent any indication as to how this is to be accomplished, we cannot say that the district court erred in the method adopted and applied in the instant case." Hughes v. Inland Container Corp., 247 Kan. 407, 414, 422, 799 P.2d 1011 (1990).

(41) Hughes, while indicating a balance of the two factors is required, does not state specifically how this balance is to occur or what emphasis is to be placed on each of the tests.

(42) In determining legislative intent, the court is not required to examine only the language of this statute, but may properly "look into the causes which impel the statute's adoption, the objective sought to be attained, the statute's historical background and the effect the statute may have under the various constructions suggested." In re Petition of City of Moran, 238 Kan. 513, 520, 713 P.2d 451 (1986).

(43) "In so construing K.S.A. 1989 Supp. 44-510e(a), we conclude that the reduction of the claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered in determining the extent of permanent partial general disability.

> In order to arrive at a percentage, a mathematical equation or formula must necessarily be utilized. The district court determined to give each element equal weight and average the two to arrive at a percentage. This statute is silent as to how this percentage is to be arrived at, and, absent any indication as to how this is to be accomplished, we cannot say that the district court erred in the method adopted and applied in the instant case." Hughes supra at 422; Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 51, 816 P.2d 409 (1991).

(44) This statute requires a balancing of the claimant's ability to perform work in the open labor market and the claimant's ability to earn a comparable wage. These factors must be considered in the light of the employee's education, training, experience and capacity for rehabilitation. K.S.A. 1990 Supp. 44-510e(a).

(45) Mr. Langston in his evaluation of comparable wages after being provided the appropriate average weekly wage found the claimant's wage loss at the high end of her projected earnings to be 36 percent. Mr. Langston further found the claimant's wage loss at the low end of her projected earnings to be 44.9 percent. A compromise of Mr. Langston's percentage would equate to a 40 percent wage loss. Mr. Langston further opined that the claimant's loss of access to the open labor market was 30 percent. As was earlier discussed, the evaluation of Mr. Langston appeared to be based upon a less than accurate reading of the medical restrictions of Dr. Kruckemyer and a reluctance to use the more severe restrictions of Dr. Wertzberger.

(46) Mr. Vander Vegt, in his evaluation of the claimant found the claimant's loss of access to the open labor market to be 96 percent and her loss of ability to earn a comparable wage to be 100 percent.

(47) The Appeals Board, in reviewing the testimony of both experts finds that while one clearly evaluated claimant lower than the evidence indicated, the other clearly evaluated the claimant higher than the evidence indicated. In reaching a compromise forced upon this Appeals Board by less than accurate information provided to the evaluating experts, the Appeals Board does not exclude the work disability estimates of both Mr. Langston and Mr. Vander Vegt but takes these into consideration together with the record as a whole. In applying Mr. Langston's 30 percent loss of access to the open labor market and Mr. Vander Vegt's 96 percent loss of access, the Appeals Board finds the claimant has suffered a 63 percent loss of access to the open labor market. Likewise, in applying Mr. Langston's 40 percent loss of wages to Mr. Vander Vegt's 100 percent loss of wages, the Appeals Board finds the claimant has suffered a 70 percent loss ability to earn wages in the open labor market. In applying the rationale and formula approved in Hughes by combining the 63 percent loss of access to the open labor market and 70 percent loss of ability to earn wages in the open labor market, this Appeals Board finds claimant suffered a 67 percent permanent partial work disability.

In modifying the Administrative Law Judge's finding of an 80 percent work disability the Appeals Board notes that, while the trier of fact is not bound by the evidence and may make a decision on its own regarding work disability, the Court in Hughes and Schad, nevertheless, does indicate some type of mathematical equation or formula be utilized. Hughes supra at 422; Schad supra at 51. The Administrative Law Judge in awarding 80 percent work disability supplied no information to verify or support the method of analysis utilized. The Appeals Board finds it difficult to justify an 80 percent work disability based upon our review of the entire record. While a split of the rating will not be appropriate in every situation, the Appeals Board finds that, based upon the facts contained within this record, claimant is entitled to a 67 percent work disability.

(48) The claimant further alleges an entitlement to temporary total benefits from the period November 23, 1990 through and including April 14, 1991, a period of 20.57 weeks. Claimant was paid temporary total disability by the employer and insurance company to November 23, 1990, at which time the temporary total benefits were stopped. On November 22, 1990, Dr. Kruckemyer, the authorized treating physician, recommended the claimant attend a pain clinic in an attempt to alleviate the pain symptoms she was experiencing and hopefully return her to substantial gainful employment.

(49) It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

(50) Claimant was unable, due to her physical restrictions, to return to her former employment at Tony's Pizza. While the claimant was not totally restricted by the treating and evaluating physician, she was, nevertheless, restricted to the point where vocational rehabilitation appeared to be a necessity in order for her to be properly evaluated and placed in existing employment, or trained for future employment. As respondent was unable to accommodate the claimant during this period of time, and as she was proceeding under the instructions of the treating physician to attend the pain clinic, the Appeals Board finds claimant was temporarily totally disabled during this period of time and is entitled to an additional 20.57 weeks of temporary total disability at the rate of $271.00 per week, totaling $5,574.47. As this issue was not addressed in the original award, the Award of Administrative Law Judge George R. Robertson is herein modified to show claimant's entitlement to an additional 20.57 weeks of temporary total disability at the rate of $271.00 per week in the above total amount.

(51) Having found that the claimant suffered a new injury arising out of and in the course of her employment for the period June, 1989 through October 20, 1989, the Appeals Board further finds that the claimant's applicant for review and modification in Docket No. 122,934 is unnecessary and any additional consideration by this Appeals Board of that issue is rendered moot.

(52) Having established that the claimant suffered a second injury for the period June, 1989 through October 10, 1989, the Appeals Board must next address the liability of the Kansas Workers Compensation Fund.

Liability will be accessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work related injury. "An employee is handicapped under the act if the employee is afflicted with an impairment of such character as to constitute a handicap in obtaining or retaining employment." Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980). "The determination as to whether a handicap exists and whether the employer has knowledge of it is a fact question and must be made on a case by case basis." Ramirez v. Rockwell International, 10 Kan. App. 2d 403, 701 P.2d 336, (1985). "The employer has the burden of proving that it knowingly hired or retained a handicapped employee." Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

(53) "Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds that the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers compensation fund." K.S.A. 44-567(a)(1).

> "Subject to the other provisions of the Workers Compensation Act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable and based upon medical evidence the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers compensation fund." K.S.A. 44-567(a)(2).

(54) Claimant, in Docket No. 122,934 entered into a running award with the employer for an injury suffered to her low back on April 17, 1987. As a portion of this running award, the Kansas Workers Compensation Fund agreed to reimburse the respondent for 40 percent of all costs associated with that claim.

(55) With regard to the injury of June, 1989 through October 20, 1989, claimant has been found to have suffered a second injury resulting in an aggravation of a preexisting condition. Dr. Kruckemyer agreed that this injury was an aggravation of the preexisting condition and further opined that "but for" these previous problems this aggravation would not have occurred.

(56) Dr. John Wertzberger testified that claimant, with this degenerative condition in her back, was predisposed to further injury and testified that the injury or disability suffered in 1989, probably or most likely would not have occurred "but for" the preexisting physical impairment of the claimant.

(57) K.S.A. 44-508(g) states as follows:

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true", on the basis of the whole record.

(58) The Appeals Board in considering the medical testimony of Dr. Kruckemyer, Dr. Wertzberger and Dr. Eyster does not discount the testimony of Dr. Eyster but finds his opinion to be less credible and less supported by the medical findings than that of Dr. Kruckemyer and Dr. Wertzberger.

(59) A review of the entire records finds more than sufficient evidence to support the respondent's contention that claimant suffered a second injury during the period June, 1989 through October 10, 1989, and that prior to this injury claimant was a handicapped employee as defined by the Legislature in K.S.A. 44-566(d). The Appeals Board further finds that the respondent had the requisite knowledge required by K.S.A. 44-567(b) with the evidence of the knowledge of said employer being supplied by the information contained in Docket No. 122,934.

(60) This Appeals Board is satisfied after review of the entire record that the claimant suffered an injury in June, 1989 through October 20, 1989, and was disabled as a result of that injury and further finds that the injury or disability suffered by the claimant during this period probably or most likely would not have occurred "but for" the claimant's physical impairment which preexisted June, 1989. The existence of the claimant's handicapped condition as well as the already established knowledge on the part of the employer fully supports the Administrative Law Judge's finding that the Kansas Workers Compensation Fund shall be liable for 100 percent of the Award entered in Docket No. 154,563. The Kansas Workers Compensation Fund and the Office of the Insurance Commissioner of the State of Kansas are ordered to reimburse to the respondent/employer 100 percent of all monies, expenditures and costs for temporary total disability, medical, health care providers, permanent partial disability, orders or any other awards or expenditures ordered in this amount stemming from the Award in Docket No. 154,563.

(61) The Kansas Workers Compensation Fund is granted credit pursuant to K.S.A. 44-510a for the award granted to claimant in Docket No. 122,934 on the basis of 100 percent.

(62) The Appeals Board further affirms the Administrative Law Judge's finding that future medical will be provided upon proper application to the Director only.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated October 1, 1993, be affirmed in part and reversed in part in that the claimant, Margaret Peterson, is hereby awarded compensation against the respondent, Tony's Pizza Service, and its insurance carrier, Liberty Mutual Insurance Company, and the Kansas Workers Compensation Fund for 89.93 weeks of temporary total disability at the rate of $271.00 per week, totaling $24,371.03, plus an additional 8.71 weeks of temporary total disability at the rate of $271.00 per week for the period of October 21, 1989 to December 20, 1989, totaling $2,360.41, plus additional temporary total disability for the period November 23, 1990 to April 15, 1991, a total of 20.57 weeks at the rate of $271.00 per week, subtotaling $5,574.47, for a total temporary total amount of $32,305.91, followed by 166.22 weeks of permanent partial disability at the rate of $162.34 per week, totaling $26,984.15, followed by 129.57 weeks of permanent partial disability at the rate of $191.76 per week, totaling $24,846.34, for a 67 percent permanent partial general body disability, making a total award of $84,136.40, with a contribution factor of 100 percent for the prior injury on April 17, 1987.

As of December 10, 1993, there would be due and owing to the claimant 119.21 weeks of temporary total disability at the rate of $271.00 per week, totaling $32,305.91 plus 97.36 weeks of permanent partial disability at the reduced rate of $162.34 per week, totaling $15,805.42, for a total due and owing of $48,111.33 which is ordered paid in one lump sum less any monies previously paid, followed by 68.86 weeks of permanent partial disability at the reduced rate of $162.34 per week, totalling $11,178.73, followed thereafter by 129.57 weeks of permanent partial disability at the rate of $191.76 per week, to be paid until complete or until further order of the Director.

Further award is made that claimant is entitled to future medical treatment upon proper application.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent, with 100 percent reimbursement by the Kansas Workers Compensation Fund, to be paid as follows:

OWENS, BRAKE & ASSOCIATES

Transcript of Proceedings, Dated April 16, 1991	$ 276.30
Regular Hearing Transcript, Dated October 22, 1992	$ 340.96
Deposition of Dr. Alan Kruckemyer,	

Dated January 5, 1993	$ 500.45
Deposition of Bud Langston, Dated February 15, 1993	$ 531.20
Deposition of Dr. Robert Eyster, Dated May 5, 1993	$ 456.05
Total	$2104.96

HOSTETLER & ASSOCIATES, INC.

Deposition of Donald Vander Vegt, Dated November 3, 1992	$ 209.95
Deposition of Dr. John Wertzberger, Dated November 3, 1992	$ 238.60
Total	$ 448.55

IT IS SO ORDERED.

Dated this 14th day of December, 1993.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Gary L. Jordan, P.O. Box 623, 313 S. Hickory, Ottawa, Kansas 66067
John W. Mize, P.O. Box 380, Salina, Kansas 67402-0380
Norman R. Kelly, P.O. Box 2388, Salina, Kansas 67402-2388
George R. Robertson, Administrative Law Judge
George Gomez, Director